U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAY 07 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal and approve the petition.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a postdoctoral fellow at the Maryland, conducting research on medical imaging. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B)Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on March 8, 2012. In an accompanying statement, counsel stated:

> [The petitioner's] work will clearly benefit the national interest of the United States by . . . virtue of his achievements in the area of medical image analysis. Over the course of his career [the petitioner] has made remarkable and groundbreaking contributions to the field. His studies on computer algorithms for ankylosing

> spondylitis have been highly acknowledged and recognized by fellow peers. [The petitioner] has designed the first computer algorithm to quantitatively measure syndesmophytes in the 3D space of a CT scan. This breakthrough has allowed him to present at prestigious conferences and to be published in well known journals. . . .
>
> His groundbreaking research in the field of medical image analysis, specifically as it relates to arthritis, bone and joint problems, and other rheumatic diseases, has already been of great benefit to the nation. . . .
>
> [The petitioner] has been consistently publishing highly important articles throughout his career. . . . These publications have been cited 98 times since 1999.

The petitioner submitted copies of ten articles published between 1999 and 2010. The petitioner also submitted information regarding 16 conference presentations between 2001 and 2011. Printouts from the Google Scholar database corroborated counsel's citation figures. Printouts from the publishers' web sites show the impact factors for some of the journals that carried the articles.

Counsel stated: "In August 2011, [the petitioner's] inventions were released in the Federal Register indicating that the U.S. Government is willing to license these inventions and believes others will be interested in licensing them. (See Exhibit 3)." Exhibit 3 consists of a copy of 76 Fed. Reg. 51376-77 (August 18, 2011). The listing "Government-Owned Inventions; Availability for Licensing" reads:

> **Quantitative Measurement of Syndesmophytes in Ankylosing Spondylitis Using Computed Tomography (CT)**
>
> Description of Technology:
>
> Syndesmophyte (abnormal bone) growth in the spine is a hallmark of Ankylosing Spondylitis, a type of inflammatory arthritis. Syndesmophyte growth is currently monitored using semiquantitative scoring of radiographs, but radiographs consider only a small part of the vertebra, and the method is subject to reader error. Because syndesmophytes grow slowly, radiographs also lack sensitivity. The invention provides a method to measure syndesmophytes using data from computed tomography scans of the lumbar spine. It provides computer algorithm that fully quantitates syndesmophyte volumes in three-dimension space. This method allows precise and accurate measurement of the presence and rate of growth of syndesmophytes over time, which for the first time will permit testing of whether any treatments can slow the progression of this type of spinal arthritis.
>
> Potential Commercial Applications:
>
> • The method would be useful for clinical trials of drugs against Syndesmophyte growth.

• Because of the improved precision, achieving statistical significance in assessing the efficacy of a drug would require smaller samples.

Competitive Advantages:

• The present method is more automated than existing methods.
• The method is more precise and sensitive than existing methods, thus providing more reliable statistical analysis and improved planning in treatment regimen.

The petitioner submitted no documentary evidence to show whether publication of such "Availability for Licensing" notices is routine for innovations developed at or else is reserved for innovations seen to be especially significant. The petitioner also did not establish how many entities (if any) responded to the notice with requests to license the method, or show that the response rate stands out in comparison to notices for other innovations. The Federal Register listing may be quite significant, but the petitioner did not submit sufficient documentation to support such a conclusion.

The petitioner submitted letters from six witnesses who have worked with the petitioner at various stages of his career. Dr. a senior academic at the United Kingdom, supervised the petitioner's doctoral research there. Dr. stated:

> This work involved the modeling of realistic clutter backgrounds by a number of methods which were successful in detecting very weak signals in high levels of clutter. [The petitioner] also applied his methods to a pattern recognition correlator for robust, distortion invariant fingerprint recognition. . . . The work contributed significantly to enhancing the performance of correlation filters for the pattern recognition of targets in high clutter backgrounds and has been subsequently used extensively in both our own group's research on filter development and that of other research groups, particularly those in the United States who have widely cited the papers.

Professor director of the at United Kingdom, stated:

> [The petitioner] worked as a researcher in my laboratory for 3 years after finishing his PhD. . . . He was extremely productive generating two novel applications. In the first project he developed a novel technique for fast implementation of a space variant Gaussian filter, which allowed us to model the output of neural processing in the visual system . . . [taking into account] variable resolution from central to peripheral vision. . . . [The petitioner's] work allowed us to significantly speed up our filtering algorithms. We developed this line of thinking in an entirely novel rear view mirror application. Again, taking inspiration from the human visual system, [the petitioner] developed a geometric algorithm that transformed the motion of an overtaking car . . .

> to deliver constant lateral motion of the overtaking car in the mirror for a constant overtaking speed. This was an entirely novel approach to the problem of analyzing the motion of road vehicles. This could be used to compute an overtaking car's approach speed visually by the much simpler process of measuring translation speed in the wing mirror.

Both Dr. and Prof. praised the petitioner's subsequent work at Four witnesses who had worked with the petitioner there provided details about that work.

Dr. associate scientist and lab manager at the Department of Radiology and Imaging Sciences, Clinical Center, stated:

> [The petitioner] joined my group in April of 2005. . . . I state with absolute confidence that [the petitioner] is a scientist of extraordinary ability. His scientific achievements in the field of image analysis for ankylosing spondylitis disease are both highly original and extremely substantial.

In technical detail, Dr. stated that the petitioner developed a new imaging method that was superior to the previous method (simple radiographs, or X-ray photographs) for tracking the progress of ankylosing spondylitis. Dr. then stated:

> Another area [in which the petitioner] has made [a] significant contribution is in the computer aided detection of colonic cancer using virtual colonoscopy. . . . [The petitioner] proposed a brilliant idea to make use [of] the extrema curvature called ridgelines on the colon surface to detect and segment polyps and haustral folds. [The petitioner's] method effectively increases the sensitivity and reduces the number of false positives caused by the haustral folds.

Dr. now owner of was formerly the magnetic resonance (MR) section chief in Radiology and Imaging Systems at Dr. stated:

> [The petitioner] began working in the Clinical Imaging Processing Section of the Diagnostic Radiology Department in 2004. . . .
>
> I introduced [the petitioner] to a unique research challenge presented to me by the A respected health outcomes investigator, Dr. was assembling a longitudinal study of patients with ankylosing spondylitis, and sought my guidance to improve on markers of disease progression through a more rigorous use of high resolution imaging and image processing.
>
> . . . [The petitioner] envisioned and implemented a tailored 3D image processing strategy to address our research aims. . . . [The petitioner] developed a robust

> methodology for defining the critical ridgelines that demarcate the key, clinical anatomy in spondylitis. . . . This exciting advance facilitated the automated quantification of subtle paravertebral ossification – a marker of disease progression in ankylosing spondylitis. . . .
>
> [The petitioner's] notable progress on this complex and important problem was recognized by his collaborators in and he officially joined Dr. clinical outcomes research group.

Dr. chief of the Clinical Trials and Outcomes Section at , the petitioner's collaborator from 2007 to 2009 and his supervisor since then, stated:

> [The petitioner] has worked on development of a sensitive and accurate method to measure abnormal bone growth in . . . ankylosing spondylitis. . . .
>
> [The petitioner] single-handedly developed the computer algorithms and tested the method. This contribution will likely lead to commercial licensing, as this invention overcomes a major hurdle in the assessment and treatment of patients with this condition.

Dr. now an assistant professor at previously worked with the petitioner at provided background information about ankylosing spondylitis, and stated that the petitioner's imaging algorithm (described by other witnesses) is an "immeasurable" and "ground-breaking" contribution, and that USCIS should permit the petitioner to remain at "where he can actively engage with other scientists and researchers . . . [and] continue to foster development in this area of research."

On July 16, 2012, the director issued a request for evidence. The director described several of the petitioner's initial exhibits (including letters and citation materials), and concluded that "the petitioner has not established that the beneficiary has specific prior achievements with some degree of influence on the field." The director also stated: "the petitioner did not explain how these activities are original contributions of major significance in the field."

In response to the notice, counsel noted that the reference to "original contributions of major significance" derives from regulations for a different immigrant classification (specifically the regulation at 8 C.F.R. § 204.5(h)(3)(v), pertaining to aliens of extraordinary ability). Counsel asserted, correctly, that the petitioner need not meet the "extraordinary ability" threshold in order to qualify for the national interest waiver.

Counsel discussed the petitioner's published works, and asked the director to "evaluate[] both the standing and prestige of the journals in question." Publication in prestigious journals is a means of disseminating one's work, but a given article does not derive its impact or influence from the journal that carries it. Rather, a journal earns its reputation by publishing high-quality articles. Eligibility

for the waiver rests on the individual merits of the petitioner, rather than on generalizations such as the schools he attended, the employers for whom he has worked, or the journals that have published his work. Institutional affiliation is not without weight, but it conveys no presumption of eligibility.

The petitioner submitted updated citation information, and counsel observed that the petitioner's "number of citations currently stands at a minimum of 149." The increasing number of citations is consistent with growing reliance on the petitioner's work.

Counsel stated that "high level sources" have sought the petitioner's input. Specifically, printouts of electronic mail messages show that the publisher of invited the petitioner to guest-edit an issue; another publisher , in invited the petitioner to contribute a chapter to a forthcoming book; and "the leading community for sharing surgical know-how for surgeons, by surgeons," invited the petitioner to submit content regarding one of his articles. The petitioner submitted no evidence that any of these messages came from "high level sources."

The message, from May 2010, is the only one to predate the filing of the petition. The message reads like a promotion for the community, rather than any personal message to the petitioner. The message mentions the petitioner's article only once, followed by the phrase "If you are indeed the author"; there is no discussion of information in the article. The phrase "If you are already a member" indicates that the author of the message did not know whether or not the petitioner was a member. Also, it is not readily apparent why a web site "for surgeons, by surgeons" would solicit content from the petitioner, who is not a surgeon. It appears that the petitioner received the electronic equivalent of a "form letter."

The other two messages are from April 2012, after the petition's March 2012 filing date. The message from contains no details about the petitioner's work, only the generic assertion: "Your previous work has led us believe [*sic*] that you may have new research findings relevant to the field and valuable to this publication." The message appears to be another "form letter" soliciting submissions for the proposed book.

The message from reveals that was "launched in June 2011," less than a year before the petition's filing date. The petitioner had previously submitted reference materials to show "the standing and prestige of the journals" that have carried the petitioner's work. Those materials did not identify as a well-regarded or influential journal. Absent such evidence, counsel did not explain how the publisher is a "high level source." The message from the publisher asked the petitioner to "please refer the journal to [his] colleagues and other contacts in the field, including [his] librarian, for promotional purposes . . . , submissions . . . , and subscriptions." The promotional nature of the message and the very recent launch date indicate that was attempting to build up its journal's reputation, rather than trade on existing prestige or recognition in the field.

Even if the petitioner had established that the invitations were as prestigious as the petitioner claimed, they could not retroactively establish eligibility as of the filing date. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The director denied the petition on November 30, 2012. The director acknowledged the intrinsic merit of the petitioner's occupation, and the national scope of the benefits arising from work in that occupation. The director concluded that the petitioner had not established the impact or influence of his work on this field. The director stated: "The petitioner did not offer any evidence to show that the frequency or number of publications and citations to his work is unusual in the field, or explain how these activities show the beneficiary already has a past record of achievement with some degree of influence on the field."

The director repeated the conclusion that "the petitioner did not submit any evidence to show that the beneficiary's original contributions are considered of major significance." On appeal, counsel again objected that the director held the petitioner to too high a standard. The record justifies counsel's complaint. While the threshold for the waiver is necessarily high, it is lower than the standard for extraordinary ability (a classification that requires not only influence, but acclaim. *See* section 203(b)(1)(A) of the Act.)

The director acknowledged the submitted citation figures, and stated: "Research and publication conducted in the course of one's professional duties are inherent in the field. The petitioner did not offer any evidence to show that the frequency or number of publications and citations to his work is unusual in the field." Counsel, on appeal, notes that the petitioner had submitted documentation of the journals' impact factors, which provides some baseline for comparing citation rates. Counsel also quoted from previously submitted witness letters, to show that others in the field have relied upon the petitioner's work.

The witness letters are all from the petitioner's own mentors and collaborators, and therefore are not first-hand evidence of wider impact or influence. They are more useful as explanations of the nature of the petitioner's work.

The citations of the petitioner's work have greater weight as objective evidence that other researchers are using the petitioner's findings in their own work. As noted previously, the petitioner's initial submission showed a considerable number of citations, with even more shown in response to the request for evidence. The impact factor information gives some indication of the citation frequency of articles in a given journal, and the petitioner's information consistently compares favorably in this regard.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, rather than on the merits of the individual alien. That being said, the evidence in the record establishes that the scientific community recognizes the significance of this petitioner's research rather than simply the general area of research, and that the petitioner has made a variety of influential contributions. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has submitted sufficient evidence to establish, by a preponderance of evidence, that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the AAO will withdraw the director's decision and approve the petition.

ORDER: The appeal is sustained and the petition is approved.